Ligar Fernandez v Eric Claude Cooke

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24–180 OF 2000
ABDULL HAMID EMBONG J
5 DECEMBER 2001

Succession *— Executors — Revocation of appointment — Executor appointed as trustee under will — Executor absent from Malaysia for over 12 months — Whether executor legally incapable of acting as a trustee — Trustees Act 1949 s 40(1)*

Succession *— Probate — Revocation of grant — Objective test — Probate may be revoked or amended for any sufficient cause — Fraudulent transfer of properties — Whether sufficient evidence adduced to raise suspicion of executor's inaction or want of diligence — Probate and Administration Act 1959 s 34*

Trusts and Trustees *— Trustees — Removal — Revocation of appointment of executor and trustee under will — Executor and trustee absent from Malaysia for over 12 months — Whether executor legally incapable of acting as a trustee — Trustees Act 1949 s 40(1)*

A Ms LaBrooy passed away in 1999 and probate was obtained by her appointed co-executors and trustees, namely, the plaintiff and the defendant. The main beneficiary under Ms LaBrooy's will was her adopted daughter ('Patricia'). There were two matters that gave rise to suspicions by the plaintiff and Patricia regarding misconduct on the part of the defendant. The first matter concerned the disposal of the estate's assets, namely, the transfer of certain godowns owned by Ms LaBrooy and her siblings ('the Godown Properties') to a family company ('CHLSB') in which the defendant was a substantial shareholder and director. The second matter concerned the transfer of Ms LaBrooy's shares in CHLSB to the defendant and his relatives. According to the plaintiff, those transactions were tainted or improper and those assets, namely the Godown Properties and Ms LaBrooy's shares in CHLSB, should be included as assets of the estate for distribution to the beneficiaries. By this application, the plaintiff sought to revoke the grant of probate to the defendant and to remove forthwith the defendant's appointment as the executor of the estate of Ms LaBrooy. According to the plaintiff, the defendant was residing in England and had been out of Malaysia in excess of 12 months. Various evidence was put forth by the plaintiff to show that the defendant had been a British permanent resident for over twenty years, including the defendant's address stated in CHLSB's register of members and the register of electors for the constituency of Southampton Test in England. In a letter from the defendant to Patricia, which was tendered as evidence, the defendant admitted that he was too busy with his work at the University of Southampton to execute the will. It had also been shown that because of the defendant's continued absenteeism, the estate could not be fully administered and payments to three charities named under the will were in fact not made.

Held, allowing the application: A

(1) The first relief sought by the plaintiff for the revocation of the probate was provided under s 34 of the Probate and Administration Act 1959 ('PAA') and pursuant to that provision, any probate or letters of administration may be revoked or amended for any sufficient cause. Applying the objective test, all B that was needed to invoke the court's jurisdiction under s 34 of the PAA and allow the relief sought was for the plaintiff to adduce sufficient evidence to raise a strong suspicion of the defendant's inaction, want of diligence and dishonesty or a conflict of interest situation or inability to act. The allegations for consideration were thus, a question of facts to be determined by the court on an C objective test. Therefore, it was immaterial whether the allegations were actually believed or not, so long as it can be objectively determined that they raised a reasonable suspicion (see pp 182F–183D).

(2) In the instant case, the transactions concerning the transfer of the D Godown Properties and the transfer of Ms LaBrooy's shares in CHLSB were tainted with fraud and having considered the circumstances of the transactions, the conclusion arrived at was that, on an objective test, sufficient cause had been raised to forthwith revoke the probate pursuant to s 34 of the PAA (see pp 187I–188B). E

(3) In respect of the second relief for the removal of the defendant as executor and trustee under the will, the court was empowered to remove an executor or a trustee, where there occurred a failure to act grounded either on unfitness or incapacity and the primary consideration, on an objective examination of the facts, was to F determine that the welfare and interests of the beneficiaries and the assets of the estate be safeguarded. The grounds for removal should remain open according to the particular circumstances of the case (see p 185F–H).

(4) The court was not concerned with the fact that the defendant was G a Malaysian citizen or had a permanent postal address in Malaysia but rather with his continued absence from Malaysia for over 12 months as this rendered him legally incapable of acting as a trustee pursuant to s 40(1) of the Trustees Act 1949. Based on the evidence shown by the plaintiff, the defendant had been an absent trustee and on this ground alone, the defendant must be removed H from his office (see p 187B–D).

[Bahasa Malaysia summary

Seorang bernama Cik LaBrooy telah meninggal dunia pada tahun 1999 dan probet telah diperolehi oleh wasi bersama dan pemegang- I pemegang amanah beliau yang dilantik, iaitu, plaintif dan defendan. Benefisiari utama di bawah wasiat Cik LaBrooy adalah anak

A angkatnya ('Patricia'). Terdapat dua perkara yang membangkitkan keraguan oleh plaintif dan Patricia berhubung salah laku di pihak defendan. Perkara yang pertama adalah berhubung dengan pelupusan aset-aset harta pesaka tersebut, iaitu pemindahan milikan gudang-gudang tertentu yang dimiliki oleh Cik LaBrooy dan adik-beradiknya ('the Godown Properties") kepada sebuah syarikat keluarga B ('CHLSB') di dalam yang mana defendan merupakan pemegang saham yang substansial dan seorang pengarah. Perkara yang kedua berkaitan dengan pemindahan saham-saham Cik LaBrooy di dalam CHLSB kepada defendan dan saudara-maranya. Menurut plaintif, transkasi-transkasi itu tercemar atau tidak mengikut aturan dan aset-C aset itu, iaitu Godown Properties dan saham-sahan Cik LaBrooy di dalam CHLSB, haruslah dimasukkan sebagai aset-aset harta pesaka tersebut untuk pengagihan kepada benefisiari-benefisiari. Melalui permohonan ini, plaintif cuba untuk membatalkan pemberian probet kepada defendan dan membatalkan dengan segera perlantikan defendan sebagai wasi harta pesaka Cik LaBrooy. Menurut plaintif, D defendan telah bermastautin di England dan telah berada di luar Malaysia melebihi 12 bulan. Pelbagai keterangan telah dikemukakan oleh plaintif bagi menunjukkan bahawa defendan telah menjadi pemastautin tetap British selama lebih daripada dua puluh tahun, termasuk alamat defendan yang dinyatakan di dalam daftar ahli-ahli CHLSB dan daftar pemilih-pemilih untuk bahagian pilihanraya E Southampton Test di England. Dalam sepucuk surat daripada defendan kepada Patricia, yang mana telah dikemukakan sebagai keterangan, defendan mengakui bahawa beliau terlalu sibuk dengan kerjanya di University of Southampton untuk menyempurnakan wasiat tersebut. Juga ditunjukkan bahawa disebabkan oleh ketidak-F hadiran defendan yang berterusan, harta pesaka tersebut tidak boleh ditadbirkan sepenuhnya dan pembayaran kepada tiga buah pertubuhan kebajikan yang dinamakan di bawah wasiat tersebut telah pada hakikatnya tidak dilaksanakan.

Diputuskan, membenarkan permohonan tersebut:

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(1) Relif pertama yang dipohon oleh plaintif untuk pembatalan probet tersebut telah diperuntukkan di bawah s 34 Akta Probet dan Pentadbiran 1959 ('PAA') dan selaras dengan peruntukan itu, sebarang probet atau surat-surat pentadbiran boleh dibatalkan atau dipinda atas sebarang sebab yang memadai. H Memakai ujian objektif, apa yang diperlukan untuk membangkitan penggunaan bidang kuasa mahkamah di bawah s 34 PAA dan membenarkan relif yang dipohon adalah bagi plaintif mengemukakan keterangan yang secukupnya untuk membangkitkan keraguan yang kukuh mengenai ketiadaan tindakan oleh defendan, ketiadaan usaha dan ketidakjujuran atau I suatu konflik kepentingan situasi atau ketidakupayaan untuk bertindak. Maka, dakwaan-dakwaan untuk dipertimbangkan adalah persoalan fakta-fakta yang harus ditentukan oleh

mahkamah atas satu ujian objektif. Oleh itu, adalah tidak penting sama ada dakwaan-dakwaan tersebut sebenarnya dipercayai atau pun tidak, asalkan ia boleh ditentukan secara objektif bahawa mereka telah membangkitkan suatu keraguan yang wajar (lihat ms 182F–183D).

(2) Dalam kes semasa, transkasi berhubung dengan pemindahan milikan Godown Properties dan pemindahan saham-sahan Cik LaBrooy di dalam CHLSB telah dicemari dengan perbuatan fraud dan setelah mempertimbangkan keadaan transaksi-transaksi tersebut, kesimpulan yang dicapai adalah bahawa, atas satu ujian objektif, kausa yang memadai telah dibangkitkan untuk segera membatalkan probet tersebut selaras dengan s 34 PAA tersebut (lihat ms 187I–188B).

(3) Berhubung dengan relif kedua untuk penyingkiran defendan sebagai wasi dan pemegang amanah di bawah wasiat tersebut, mahkamah telah diberi kuasa untuk menyingkir seorang wasi atau pemegang amanah, di mana berlakunya kegagalan untuk bertindak berdasarkan sama ada atas ketidakupayaan atau keadaan kesihatan yang tidak mengizinkan dan pertimbangan utama, atas satu pemeriksaan objektif fakta-fakta, adalah untuk menentukan bahawa kebajikan dan kepentingan benefisiari-benefisiari serta aset-aset harta pesaka tersebut dijaga dengan selamatnya. Alasan-alasan untuk pembatalan seharusnya kekal terbuka mengikut keadaan-keadaan tertentu kes tersebut (lihat ms 185F–H).

(4) Mahkamah tidak memandang berat hakikat bahawa defendan adalah seorang warganegara Malaysia atau mempunyai alamat pos tetap di Malaysia tetapi sebaliknya memandang berat ketiadaan beliau di Malaysia yang berterusan selama lebih dari 12 bulan kerana ini menjadikan beliau tidak berkeupayaan di sisi undang-undang untuk bertindak sebagai seorang pemegang amanah selaras dengan s 40(1) Akta Pemegang Amanah 1949. Berdasarkan keterangan yang ditunjukkan oleh plaintif, defendan telah menjadi pemegang amanah yang tidak hadir dan atas alasan ini sahaja, defendan mestilah disingkirkan daripada jawatannya (lihat ms 187B–D).]

[*Editorial Note*: The defendant has filed Civil Appeal No A-02-952 of 2001 to the Court of Appeal.]

Notes

For cases on revocation of appointment of executors, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1895–1896.

For cases on revocation of a probate, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1989–1994.

For cases on removal of a trustee, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2024–2030.

Cases referred to

Damayanti Kantilal Doshi & Ors v Jigarlal Katilal Doshi & Ors [1998] 4 MLJ 268 (refd)
Khoo Boo Gong, decd, Re; Khoo Theng Seong v Teoh Chooi Ghim & Ors [1981] 2 MLJ 68 (refd)
Letterstedt v Broers & Anor (1884) 9 AC 371 (refd)
Miller v Cameron (1936) 54 CLR 572 (refd)
Monty Financial Services Ltd (formerly known as Inscorp Holdings Lts) & Anor v Delmo 1995 VIC Lexis 1477 (refd)
Yusof bin Ahmad & Ors v Hongkong Bank (Singapore) Ltd & Ors [1990] 2 MLJ 326 (refd)

Legislation referred to

Administration and Probate Act 1958 [Aust] s 34(1)(c)
Probate and Administration Act 1959 s 16(b) 34
Trustees Act 1949 s 40

T Marbeck (TS Marbeck & Co) for the plaintiff.
James Devadason (Maxwell, Kenion, Cowdy & Jones) for the defendant.

Abdull Hamid Embong J: By this application, the plaintiff ('LF') seeks to revoke the grant of probate to the defendant ('EC') and to remove forthwith EC's appointment as the executor and trustee of the estate of Ms Leila Dulcie Allana LaBrooy ('Ms LaBrooy'). The determination of this application will, in my view, substantially resolve three other related applications in encl 8 of Originating Summons No 24–1146 of 1999 and encll 1 and 6 in Originating Summons No 24–891 of 2000.

Although learned counsel for the defendant had contended that the matters under consideration are too contentious to be determined by affidavits, that there are triable issues and that, thus, the court should hear *viva voce* evidence, this court found that there was no such necessity and that this application should proceed as it originated, and affidavit evidence could sufficiently determine this matter. On that basis, this application was proceeded with, and submissions heard. Notice to cross examine witnesses was declined by the court.

Background facts

On 11 February 1999, Ms LaBrooy passed away and left a will dated 24 April 1996 and executed two codicils dated 17 April 1997 and 15 August 1997. Probate was obtained by her appointed co-executors and trustees, namely the plaintiff ('LF') and the defendant ('EC'), and the grant of probate was issued on 22 September 1999 by the High Court at Ipoh. LF is the former husband of one Patricia Frances O'Hara ('Patricia'), an adopted daughter of Ms LaBrooy and the main beneficiary under her will, whilst EC is the nephew of Ms LaBrooy. On 23 April 1959, a family company called CH La Brooy Sdn Bhd ('CHLSB') was incorporated with Ms LaBrooy appointed as its permanent managing director. On 8 April

1996, a transfer of certain godowns ('the Godown Properties') was effected to CHLSB for a consideration of RM1.6m purportedly raised from the issue of 240,000 new shares in CHLSB valued at RM6.67 per share (equaling RM1,680,000).

There were two matters that disquieted both LF and the beneficiary, Patricia, giving rise to suspicions of misconduct on EC's part. These were related to the disposal of the estate's assets namely, the transfer of the Godown Properties to CHLSB and secondly, the transfer of Ms LaBrooy's shares in CHLSB to EC and his relatives. These now became the basis of the complaints by Patricia who then requested LF to initiate this proceeding.

It was submitted for the plaintiff that these transactions were tainted or improper and that these assets should be included as assets of the estate for distribution to the beneficiaries. It was also submitted that EC, at the relevant time was a substantial shareholder and a director in charge of CHLSB, and that had placed him in a position of serious conflict of interest in relation to his duties and obligations as an executor and trustee under the will, and as such, his removal is warranted in law and in fact. For the defence, it was submitted that suspicion alone also does not amount to fraud and that fraud should have been specifically pleaded. It was also contended that there was no evidence that EC had exerted undue influence over Ms LaBrooy and that her old age did not imply her lack of acumen. In reply to LF's allegation that EC was out of the country for more than 12 months, it was submitted by EC's counsel that EC had a permanent address in Ipoh as evidenced by his identity card and that he owns substantial furniture in a house belonging to his aunt who had allowed her house to be used as EC's permanent address in Malaysia. It was further contended that EC had done all he could as an executor of Ms LaBrooy's will and that the allegations of impropriety and derelection of duties thrown at him were false and not proven. Essentially, the defence stand was that there were disputes of facts and triable issues to be determined, and as such an open court trial was called for.

The reliefs sought by the plaintiff here is two pronged. One is for the revocation of the probate and the other is for the removal of the defendant as executor and trustee under the will. The first relief is provided by statute under s 34 of the Probate and Administration Act 1959 ('the PAA') which states:

> Any probate or letters of administration may be revoked or amended for any sufficient cause.

In *Damayanti Kantilal Doshi & Ors v Jigarlal Katilal Doshi & Ors* [1998] 4 MLJ 268, it was held by the Court of Appeal that 'the phrase "sufficient cause" has not been defined, but the courts have always considered the welfare and interests of the beneficiaries of an estate as the paramount criterion in deciding whether or not there is sufficient cause to interfere. This is strictly an objective test'. The Court of Appeal had applied the same test as relied upon by an earlier Federal Court decision in *Re Khoo Boo Gong, decd Khoo Theng Seong v Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68.

Mr TS Marbeck, learned counsel for the plaintiff, had referred to the definition of 'sufficient cause' according to *Black's Law Dictionary* which defined it as:

> Such cause as to hold the defendant to answer charges is reasonable or probable cause or that state of facts as would lead a man of ordinary caution to conscientiously entertain a *strong suspicion* of defendant's guilt. (Emphasis added.)

Learned counsel had argued, and I accept, that applying the objective test, all that is needed is for the plaintiff to adduce sufficient evidence to raise a strong suspicion of the defendant's inaction, want of diligence and honesty, or a conflict of interest situation or inability to act to invoke this court's jurisdiction under s 34 of the PAA and allow the reliefs sought. The allegations for consideration are thus, a question of facts to be determined by this court on an objective test.

It is immaterial therefore, if the allegations are actually believed or not; so long as it can be objectively determined that they raised a reasonable suspicion, then the plaintiff would have succeeded. In this case, the arguments advanced for the first relief of revocation of the probate had been considered together with the submission on the need to remove EC as the executor and trustee under the will, for the simple reason that the grounds are interrelated and invariably overlapping. For the second relief, it was common ground that EC held both offices of executor and trustee under the will. As an executor and trustee, EC stood in a combined fiduciary relationship with the beneficiaries and his duties in both offices are closely connected. In cases where an executor is also appointed as a trustee, there is a diversity of function as described in the *Law of Trusts in Australia* (5th Ed, 1986) in the following passage:

> The origin of the offices of trustee and executor are quite different, but in modern times, largely as the result of statute, the two offices have a greater similarity than heretofore. An executor, like a trustee, is in a fiduciary relation with the beneficiary and the essential elements of a trust are all present in executorship. However, although there are great similarities between the two offices, it is not possible to identify the position of an executor with that of a trustee. Their respective powers and duties differ in an important respect. The principal duties of an executor are to get in the assets of the deceased, to pay his debts, to pay the legacies given by the will, and to distribute the assets. If a testator appoints the same person his executor and his trustee, which is usual nowadays, then that person acts as executor when he performs executorial duties, and thereafter while he continues to hold the property he is a trustee thereof. However, even though he thus becomes a trustee, his capacity as executor still remains, in so far as he may be called upon at any future time to deal in his capacity as executor with any assets which may subsequently be discovered in the estate. He may thus be executor in respect of certain assets of the testator and trustee in respect of others. If the executor, while still performing his executorial duties, carries out an instruction in his testator's will to set aside a fund and to hold it on trust for certain beneficiaries, he will, upon him setting aside that fund, become a trustee thereof and in respect of that property his executorial duties will be at an end.

In the book entitled *Probate and Administration in Singapore and Malaysia: Law and Practice*, the learned author, on the appointment of executors and trustees observed the following:

> Appointment of executors and trustees
>
> A will provides for the disposition of a testator's property. He does so through his representatives named in the will as executors and trustees. Though the same persons may be appointed as executors and trustees, their functions are quite distinct. An executor calls in the estate, converts the assets into cash and distributes the same amongst the beneficiaries if this is what the will directs.
>
> The act of the executor in calling in the estate and attending to all predistribution formalities is the act of an executor per se. The act of distributing the estate amongst the different beneficiaries is the act of a trustee. These are distinct duties and it is a slender line which divides the duties of an executor from that of a trustee.

The court may exercise its inherent jurisdiction to remove a trustee on the grounds as provided under s 40 of the Trustees Act 1949 ('the TA') which states:

> Power of appointing new or additional trustees
>
> (1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of Malaysia for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is a minor then, subject to the restrictions imposed by this Act on the number of trustees.

The court may also appoint new or additional trustees under that section and in consequence of the removal of an existing trustee.

In *Yusof bin Ahmad & Ors v Hongkong Bank (Singapore) Ltd & Ors* [1990] 2 MLJ 326, the grounds justifying the removal of trustees were held to be:

> The acts or omissions which are sufficient for the removal of trustees must be such as to endanger the trust property, to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

In similar vein, over a century ago in *Letterstedt v Broers & Anor* (1884) 9 AC 371, a case concerning removal of trustees, the proposition put was that 'an executor has an obligation to preserve the trust fund and to safeguard the interest of the beneficiaries'. And in Australia, in *Miller v Cameron* (1936) 54 CLR 572, that statement of principle has been adopted when Dixon J restated it in the following manner:

> The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee, the court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary.

The learned judge in that case also stated the following principle, to which this court subscribes:

> It is fundamental that a trustee must carry out the terms of the trust. If he fails to do so, he may be removed as trustees by a court even if no harm has been done to the beneficiaries or to the trust.

The statutory basis provided by s 40 of the TA should, in this court's view, remain flexible and wide in its interpretation to allow the court the full force of its powers in its discretionary exercise to remove a trustee where it can be shown that either a trustee has failed or refused to carry out the terms of the trust or where by his acts or omission, the trustee has endangered the trust property. One important point to remember in exercising this discretionary power however, is that the testator's selection of the executor should not lightly be ignored or disregarded.

In an unreported decision of Ashley J of the Supreme Court of Victoria in *Monty Financial Services Ltd (formerly known as Inscorp Holdings Lts) & Anor v Delmo* (1995 VIC Lexis 1477), the learned judge after considering a number of authorities said:

> The consequences of these lines of authority was said to be that s 34(1)(c) applies not only to misconduct, such as unwarranted failure to administer an estate or so as to cause loss to beneficiaries, but also to cases of conflict of duty and interest. In that context, it is enough that there exists a suspicion that a dereliction of duty will arise, or that there is temptation for the executor to prefer his personal interest to his duty as executor.

That comment was made in the context of the Australian s 34(1)(c) of the Administration and Probate Act 1958 which allows for the removal of an executor or administrator to whom probate has been granted where it is found that he 'is unfit to act or refuses to act or is incapable of acting in such office'. I had referred to the abovecited passage from *Delmo* as equally applicable to the interpretation on the factors of 'unfitness, refusal or incapacity to act' as found in s 40 of our TA for which there is a lack of domestic authorities.

From the authorities referred to above, it may be concluded that this court is empowered to remove an executor or a trustee, where there has occurred a failure to act grounded either on unfitness or incapacity and the primary consideration, on an objective examination of facts, is to determine that the welfare and interest of the beneficiaries and the assets of the estate be safeguarded. The grounds for removal should remain open, or, to borrow the words of Dixon J, 'based upon considerations possibly large in number or varied in character' according to the particular circumstances of each case. It is perhaps apt to now quote the very words of Lord Blackburn who propounded this principle in *Letterstedt* and to which this court adheres in deciding this application. His Lordship said this:

> In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety.

It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.

Looking therefore at the whole circumstances of this very peculiar case, the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties that may yet have to be performed, their Lordships can come to no other conclusion than that it is necessary, for the welfare of the beneficiaries, that the Board should no longer be trustees.

Court's finding on the facts

Mr Marbeck for the plaintiff, in his submission, had adverted to a host of factors against the conduct of EC, citing instances of unfitness to act, conflict of interest, inaction, want of reasonable fidelity and dishonesty, and as regards the transfer of the Godown Properties, he had alleged, discrepancy, impropriety and illegality in the transactions.

The first of which is the allegation that EC resided in England and had been out of Malaysia in excess of 12 months, a factor which if proven, would make him statutorily incapable of acting in the office of trustee pursuant to s 40(1) of the TA. It is easy to see the rationale of this requirement on domicile. An absent trustee would not be in the position to administer the trust property located here. An absence from Malaysia of longer than 12 months becomes a legal incapacity for a trustee and in fact under s 40(1) of the TA is the second most damning factor after death, to incapacitate a trustee from holding his office. Similarly, a legally incapacitated executor by reason of absence may be replaced by another who is capable of administering the estate (see s 16(b) PAA 1959). Various evidence were put forth to show that EC had been away overseas all these years, one of which was his address noted in the register of members of CHLSB dated July 1971, which described EC's then address as '73 Dunstan Road, Golders Green, London NW 11'. From another document, ie the Southampton City Council, register of electors 1999 (qualifying date 10 October 1998), it was successfully shown that EC was a registered voter for the constituency of Southampton Test in England, thus raising an inference that he was a resident within that constituency. This register of electors 1999 (exh 'LF9' encl 2) also supports LF's allegation that EC resides at 31, Chamberlain Road, Highfield, Southampton, England, as shown from EC's own letter to LF (exh LF 6A). The plaintiff also produced share certificates of EC showing his share holdings in CHLSB and describing his address in 1996 as 16 Icen Road, Weymouth, Dorset, England (see exh 'LF 2A, 2B and 2C'). In his affidavit, LF also stated that EC is an employee with the University of Southampton and had in fact been a permanent British resident for over 20 years. EC has an e mail address ecc@ecs.soton.ac.uk and was too busy with his university work to execute the will. This can be seen from EC's letter to Patricia (exh 6B) wherein he admitted to his pressure of work and busy schedule with the university.

In respect to this issue of his absence from Malaysia and residence in England, EC had deposed that he has a permanent address in Malaysia at No 2 Jalan LaBrooy, Ipoh. This house is that of his late auntie's (Mrs Ivy Cooke) and he said that when she was still alive he would always stay with her on his visits to Ipoh. EC also said that he is a Malaysian citizen. Further, the deceased, Ms LaBrooy, had also allowed him to use her address, at No 12 Jalan LaBrooy as his permanent address. This may be so, but the court, it must be said, is not concerned with EC's citizenship or his having a permanent postal address in Malaysia, but rather with an executor's continued absence from Malaysia for over 12 months, for which the law forbids. It is a question of one's efficaciousness and ability as a trustee under a will. Against the overwhelming evidence to the contrary as shown by the plaintiff to which EC had not seriously disputed, it is this court's finding that EC had been an absent trustee to effectively execute his duties as a trustee. It had also been shown, because of EC's continued absenteeism, that the estate could also not be fully administered in that payments to three charities named under the will were never made. Mr Marbeck in his submission, had charged him of total inaction. In the circumstances, I can only agree with learned counsel. On this ground alone, pursuant to s 40(1) of the TA, EC must be removed from his office as he is now found to be unfit and incapable of acting as a trustee.

As for the other issue that disturbed both LF and his ex wife, Patricia viz the transfer of the Godown Properties and the shares in CHLSB by EC to himself, it had been submitted that EC had placed himself in a position of conflict of interest in his role as trustee and director in control of CHLSB and benefited from both transactions. The Godown Properties were originally owned by the testator, Ms LaBrooy and her siblings. The facts adduced showed that EC was the alter ego of CHLSB. He was both de facto director in charge and a substantive shareholder in that company, and as a trustee he should have called in the properties, and in so doing, enlarged the estate for the benefit of all the beneficiaries. But he had chosen to instead transact in the shares in a manner that benefited himself and a few selected beneficiaries. The existing directors at the time of transfer were Ms Ivy Cooke, then almost 80 years of age and EC. At such a late age, it can safely be presumed that she had to rely on the latter to manage the company. Learned counsel for the plaintiff had also succeeded in showing that CHLSB was a company with an issued capital of a mere RM657,400 and was not in the position to pay for the Godown Properties valued at RM1.68m. Further, the authorized capital of CHLSB was only RM1m. It was also shown that one of the transferees, Lionel LaBrooy, was paid RM400,000 in the transaction which works out to be 25% of the transfer price when he had a shareholding of only 20%. Besides that, it was shown that it was not even CHLSB which paid the money, but that it was paid out of one Dulcieville Estate's account of which the said Lionel was a joint owner. Mr Marbeck questioned the propriety of this dealing since, in effect, Lionel was paid for the transfer with money partly belonging to him. Counsel submitted, and this court agreed, that the transaction was tainted with fraud, to which CHLSB was a party.

There are various other instances cited by Mr Marbeck in his submission to show that the transactions perpetrated by EC were dealt under suspicious circumstances and not for the benefit of the estate. I do not wish to recount them all except to say that this court, having considered these circumstances, had come to a conclusion that, on an objective test, and guided by the principles enunciated in the abovecited authorities, there had been raised sufficient cause to forthwith revoke the probate pursuant to s 34 PAA and also remove EC from his office of executor and trustee.

For these reasons, this application was allowed with costs.

Application allowed.

Reported by Lim Lee Na